



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 21, 2004

Ms. Jennifer L. Hall
Escamilla & Poneck, Inc.
P. O. Box 200
San Antonio, Texas 78205

OR2004-0459

Dear Ms. Hall:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 194565.

The San Antonio Independent School District (the "district"), which you represent, received a request for information in a specified former district teacher's personnel file and/or pertaining to the teacher's employment with the district. You indicate that portions of the requested information constitute personally identifiable student information contained in student education records which the district is withholding pursuant to Open Records Decision No. 634 (1995).¹ You claim that the remaining requested information, or portions thereof, is excepted from disclosure pursuant to sections 552.026, 552.101, 552.102, 552.111, 552.114, and 552.135 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

Initially, we note that most of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides that

¹ We note that in Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution may withhold information that is protected by the Family Educational Rights and Privacy Act ("FERPA") and excepted from disclosure by sections 552.026 and 552.101 of the Government Code without the necessity of requesting an attorney general decision as to those exceptions to disclosure, and (2) an educational agency or institution that is state-funded may withhold information that is excepted from disclosure by section 552.114 of the Government Code as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception to disclosure. Since the district has determined that portions of the requested information constitute personally identifiable student information contained in student education records, the district must comply with FERPA guidelines in withholding that information from the requestor.

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The submitted information includes information from a completed investigation made of, for, or by the district that must be released under section 552.022(a)(1), unless it is expressly confidential under other law or is excepted from disclosure under section 552.108 of the Government Code.² Although the district claims that portions of the submitted information are excepted from disclosure pursuant to section 552.111 of the Government Code, we note that this exception to disclosure is a discretionary exception to disclosure under the Public Information Act (the "Act") that protects the governmental body's interests and may be waived.³ As such, section 552.111 is not other law that makes information confidential for the purposes of section 552.022(a). Accordingly, we conclude that the district may not withhold any portion of this marked section 552.022(a)(1) information under section 552.111 of the Government Code. However, since the district claims that the submitted information, or portions thereof, is excepted from disclosure under sections 552.026, 552.101, 552.102, 552.114, and 552.135 of the Government Code, we will address these claims.

You claim that portions of the submitted information are excepted from disclosure pursuant to sections 552.026 and 552.114 of the Government Code. Section 552.026 incorporates FERPA into chapter 552 of the Government Code. *See* Open Records Decision No. 634 at 6-8 (1995). Section 552.026 provides:

[t]his chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

² We note that you do not claim that any portion of the submitted information is excepted from disclosure under section 552.108 of the Government Code.

³ Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.,* Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 473 (1987) (governmental body may waive predecessor to section 552.111), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

Gov't Code § 552.026. FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information, other than directory information, contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information). Under FERPA, "education records" are those records that contain information directly related to a student and that are maintained by an educational agency or institution or by a person acting for such agency or institution. *See* 20 U.S.C. § 1232g(a)(4)(A). Section 552.114(a) excepts from disclosure "information in a student record at an educational institution funded wholly or partly by state revenue." Gov't Code § 552.114(a). This office generally has treated "student record" information under section 552.114(a) as the equivalent of "education record" information that is protected by FERPA. *See* Open Records Decision No. 634 at 5 (1995).

Generally, FERPA requires that information be withheld only to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* 34 C.F.R. § 99.3 ("personally identifiable information" under FERPA includes, among other things, "[o]ther information that would make the student's identity easily traceable"); *see also* Open Records Decision Nos. 332 at 3 (1982), 206 at 2 (1978). Based on your arguments and our review of the submitted information, we have marked the information that is confidential under FERPA. *See* Open Records Decision Nos. 539 (1990), 332 (1982), 206 (1978). Accordingly, we conclude that the district must withhold this particular marked information pursuant to section 552.114 of the Government Code and FERPA.

You claim that the remaining submitted information is excepted from disclosure pursuant to section 552.102 of the Government Code. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). Section 552.102(a) is generally applicable to information relating to a public official or employee. *See* Open Records Decision No. 327 at 2 (1982) (anything relating to employee's employment and its terms constitutes information relevant to person's employment relationship and is part of employee's personnel file). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected from disclosure under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation. v. Texas Industrial Accident Board*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977) for information claimed to be protected from disclosure under the common-law right to privacy as incorporated by section 552.101 of the Government Code.⁴ Accordingly, we address the district's sections 552.101 and 552.102 claims together.

⁴ Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov't Code § 552.101.

Information is protected from disclosure under the common-law right to privacy when (1) it is highly intimate and embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *See Industrial Found.* at 683-85. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *See id.* at 683. This office has since concluded that other types of information also are protected from disclosure under section 552.101 of the Government Code. *See Open Records Decision Nos.* 659 at 4-5 (1999) (summarizing information attorney general has determined to be private), 470 at 4 (1987) (illness from severe emotional job-related stress), 455 at 9 (1987) (prescription drugs, illnesses, operations, and physical handicaps), 343 at 1-2 (1982) (references in emergency medical records to drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or emotional/mental distress).

After carefully reviewing your arguments and the remaining submitted information, we find that no portion of this information is protected from disclosure under the common-law right to privacy. Accordingly, we conclude that the district may not withhold any portion of the remaining submitted information under section 552.101 or section 552.102 of the Government Code on that basis. *See Open Records Decision Nos.* 470 (1987) (public employee's job performance does not generally constitute his private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (statutory predecessor applicable when information would reveal intimate details of highly personal nature), 405 at 2 (1983) (manner in which employee performed his job cannot be said to be of minimal public interest), 400 at 5 (1983) (statutory predecessor protected information only if its release would lead to clearly unwarranted invasion of privacy).

We note that portions of the remaining submitted information, which we have marked, may be excepted from disclosure pursuant to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request that this information be kept confidential under section 552.024 of the Government Code. *See Gov't Code* § 552.117(a)(1). However, information that is responsive to a request may not be withheld from disclosure under section 552.117(a)(1) if the employee did not request confidentiality for this information in accordance with section 552.024 or if the request for confidentiality under section 552.024 was not made until after the request for information was received by the governmental body. Whether a particular piece of information is public must be determined at the time the request for it is received by the governmental body. *See Open Records Decision No.* 530 at 5 (1989). Accordingly, we conclude that to the extent that the

former district employee with whom the marked section 552.117(a)(1) information is associated elected confidentiality for this information prior to the date that the district received this request, the district must withhold this information pursuant to section 552.117(a)(1) of the Government Code.

In addition, you claim that portions of the remaining submitted information are excepted from disclosure pursuant to section 552.135 of the Government Code. Section 552.135 provides:

(a) "Informer" means a student or former student or an employee or former employee of a school district who has furnished a report of another person's or persons' possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

(b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

(c) Subsection (b) does not apply:

(1) if the informer is a student or former student, and the student or former student, or the legal guardian, or spouse of the student or former student consents to disclosure of the student's or former student's name; or

(2) if the informer is an employee or former employee who consents to disclosure of the employee's or former employee's name; or

(3) if the informer planned, initiated, or participated in the possible violation.

(d) Information excepted under Subsection (b) may be made available to a law enforcement agency or prosecutor for official purposes of the agency or prosecutor upon proper request made in compliance with applicable law and procedure.

(e) This section does not infringe on or impair the confidentiality of information considered to be confidential by law, whether it be constitutional, statutory, or by judicial decision, including information excepted from the requirements of Section 552.021.

Gov't Code § 552.135. Because the legislature limited the protection of section 552.135 to the identity of a person who reports a possible violation of "law," a school district that seeks to withhold information under this exception to disclosure must clearly identify the

specific civil, criminal, or regulatory law that is alleged to have been violated. *See* Gov't Code § 552.301(e)(1)(A). Based on our review of your arguments and the remaining submitted information, we find that the conduct reported to the district pertaining to this matter concerns a possible violation of criminal, civil, or regulatory law under section 552.135. Accordingly, we conclude that the district must withhold the information that we have marked pursuant to section 552.135. However, because no portion of the remaining submitted information "would substantially reveal the identity of an informer," we also conclude that the district may not withhold any other portion of the remaining submitted information pursuant to section 552.135 of the Government Code.

In summary, the district must withhold the information that we have marked pursuant to section 552.114 of the Government Code and FERPA. To the extent that the former district employee with whom the marked section 552.117(a)(1) information is associated elected confidentiality for this information prior to the date that the district received this request, the district must withhold that particular information pursuant to section 552.117(a)(1) of the Government Code. The district must withhold the information that we have marked pursuant to section 552.135 of the Government Code. The district must release the remaining submitted information to the requestor.⁵

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental

⁵ As our ruling is dispositive, we need not address your remaining arguments.

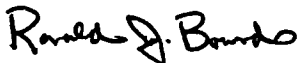
body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/lmt

Ref: ID# 194565

Enc. Marked documents

c: Mr. Lloyd Verstuyft, Principal
Southwest High School
11914 Dragon Lane
San Antonio, Texas 78252-2647
(w/o enclosures)